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84-1092

No.

IN THE

Supreme Court of the United States

October Term, 1984

AARON MARK ZIMMERMAN,

Appellant,

against

ROBERT ABRAMS, as Attorney General of the State of New York and WILLIAM KROEGER as Chairman, New York State Workers' Compensation Board,

Appellees.

ON APPEAL FROM THE NEW YORK STATE SUPREME COURT APPELLATE DIVISION, FOURTH JUDICIAL DEPARTMENT

MOTION TO DISMISS APPEAL

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Dated: January 23, 1985

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OCTOBER TERM, 1984.

AARON MARK ZIMMERMAN,

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against

ROBERT ABRAMS, as Attorney General of the State of New York and WILLIAM KROEGER as Chairman, New York State Workers' Compensation Board,

Appellees.

ON APPEAL FROM THE NEW YORK STATE SUPREME COURT APPELLATE DIVISION, FOURTH JUDICIAL DEPARTMENT.

MOTION TO DISMISS APPEAL.

Pursuant to Rule 16 of this Court, the appellees move to dismiss the appeal on the ground that the federal question which the appellant seeks to raise in this Court was not passed on by the courts of the State of New York.

Statement of the Case.

The appellant, an attorney admitted to practice in the State of New York, had previously commenced an action in December, 1981 seeking a judgment declaring that New York Workers' Compensation Law, §§ 24 and 225 and New York Judiciary Law, § 479 violate the First Amendment of the Constitution of the United States in that they restrict and abridge his right to advertise his professional services by direct mail to workers' compensation claimants. On April 6, 1982 an order (20)* was signed and entered, pursuant to stipulation of the parties, directing that the sections in question cannot be applied to bar Zimmerman from advertising the availability of his services to handle workers' compensation matters.

Because the language of the order in that action was not broad enough to encompass direct mail solicitation, Zimmerman commenced this action in October, 1982 again seeking a declaration of the nullity of the subject sections to the extent that they prohibit direct mail solicitation. The Supreme Court did not rule on the merits of this declaratory judgment action. Rather, the court, by an order dated December 3, 1982 (18), dismissed this action as barred by the doctrine of *res judicata*.

On appeal to the Appellate Division of the Supreme Court, Fourth Judicial Department, the order of dismissal was affirmed (17). Again the merits of the action were not considered. The Appellate Division based its affirmance on the absence of any justiciable controversy. The court said:

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*Numbers in parentheses refer to pages in the appellant's appendix.

> "We affirm upon the ground that the complaint calls for an advisory opinion which we are not empowered to give. There is no indication in the complaint or the affidavit opposing dismissal that a disciplinary proceeding or any other action affecting plaintiff's rights had been or was being taken or was about to be commenced." *Zimmerman v. Abrams,* 101 AD2d 691, 476 NYS2d 29.

Zimmerman appealed as of right from the Appellate Division order to the New York Court of Appeals. That appeal was dismissed on respondent's motion "on the ground that no substantial constitutional question is directly involved". 63 NY2d 675 (July 3, 1984). His motion for leave to appeal was denied on October 18, 1984 (15). This appeal ensued.

ARGUMENT.

The appeal presented here is not within the jurisdiction of this Court because the Federal question which appellant attempts to raise was not passed on by the state courts below.

As the foregoing recapitulation of this action reveals, at no point has the substantive issue been considered below. The action was dismissed at the trial level on the basis of *res judicata.* The intermediate appellate court affirmed the dismissal on the basis of the absence of a justiciable controversy. The State's highest court first dismissed the appeal taken as of right and then denied leave to appeal on the basis that no substantial constitutional question was directly involved.

For a state court order to be reviewed by this Court, it must appear from the record that the state courts decided a federal question, either expressly or implicitly. *South-*

land Corp. v. Keating, ____ US ____, 104 S Ct ____, 79 L ed 2d 1, 11 (1984); *First National Bank v. Estherville,* 215 US 341, 30 S Ct 152, 54 L ed 223 (1910). It is not sufficient that the question was raised. The federal question decision is a necessary component for jurisdiction to exist. *Webb v. Webb,* 451 US 493, 101 S Ct 1889, 68 L ed 2d 392 (1981); *Cardinale v. Louisiana,* 394 US 437, 89 S Ct 1161, 22 L ed 2d 398 (1969); *Wilson v. Cook,* 327 US 474, 66 S Ct 663, 90 L ed 793 (1946). Since the federal question has not been considered in this action, no basis exists for jurisdiction.

CONCLUSION.

The appeal should be dismissed.

Dated: Albany, New York
January 23, 1985

Respectfully submitted,

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